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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, OCTOBER 16, 2002

APPLICATION OF

THE CITY OF CHESAPEAKE

CASE NO. PUE-2002-00096

For approval of the condemnation  
of a utility easement containing  
4,214 square feet or 0.0967 acre,  
more or less, for the installation  
of a water transmission line on land  
owned by the City of Suffolk and  
located in the Sleepy Hole Borough  
of the City of Suffolk

FINAL ORDER

On March 1, 2002, the City of Chesapeake ("Chesapeake")  
filed an application with the State Corporation Commission  
("Commission") requesting approval, pursuant to § 25-233 of the  
Code of Virginia ("Code"), to initiate a condemnation action to  
acquire property of the City of Suffolk ("Suffolk"). The  
application indicated that Chesapeake sought to acquire a parcel  
of land owned by Suffolk to install a raw water transmission  
line to carry water from Lake Gaston to supply water to the  
citizens of Chesapeake.<sup>1</sup> Chesapeake requested that the  
Commission certify that a public necessity and/or essential

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<sup>1</sup> The application for condemnation identified the desired utility easement as crossing land described on a plat entitled "Plat Showing Permanent Utility Easement to be Acquired from City of Suffolk by the City of Chesapeake, Virginia, for City of Chesapeake, Virginia, Raw Water Transmission System, Sleepy Hole Borough - Suffolk, Virginia, Scale=1"=30'," dated April 28, 1998, revised May 24, 2001, made by Rouse-Sirine Associates, Ltd.

public convenience requires Chesapeake to acquire an easement via condemnation.

The Commission entered an Order on March 7, 2002, permitting Suffolk to file a response to Chesapeake's application. On March 26, 2002, Suffolk filed its response which, among other things, denied many of the allegations contained in Chesapeake's application and requested that the Commission find that no public necessity or convenience exists requiring the condemnation action. Thereafter, the parties filed additional pleadings, including statements of fact and legal memoranda in support of their positions.<sup>2</sup>

On June 26, 2002, Suffolk filed a Motion to Dismiss arguing that, on June 19, 2002, Suffolk granted an easement to Chesapeake for the purposes of constructing a raw water transmission line to carry water from Lake Gaston under and across the parcel of land owned by Suffolk. Suffolk stated that this utility easement was that requested by Chesapeake in the application before the Commission.

Also on June 26, 2002, Chesapeake filed a Motion to Amend Application of Chesapeake and an amended application which, among other things, stated that Chesapeake wished to clarify that it was seeking to acquire the utility easement to install a

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<sup>2</sup> The additional pleadings are detailed in our August 6, 2002, Order in this proceeding.

raw water transmission line to carry water from Lake Gaston, as well as other sources, to supply water to Chesapeake.

On August 6, 2002, the Commission issued an order granting Chesapeake's Motion to Amend Application of Chesapeake and denying Suffolk's Motion to Dismiss. The Commission found that this case involves whether Chesapeake should be permitted access to the courts of the Commonwealth to attempt to condemn property needed for its proposed water line. The Commission stated that before Chesapeake could obtain such permission, pursuant to § 25-233 of the Code, the Commission must: (1) certify that a public necessity or an essential public convenience so requires; and (2) conclude that the property sought to be condemned is not essential to the purposes of Suffolk. The Commission permitted the parties to file supplemental statements of fact and supplemental legal memoranda to address the amended application.

On August 23, 2002, Chesapeake and Suffolk filed supplemental statements of fact. Chesapeake filed a Supplemental Memorandum of Law on August 29, 2002. On August 30, 2002, Suffolk filed a Supplemental Brief ("Supplemental Brief") and a Motion to Dismiss ("Motion to Dismiss").

NOW THE COMMISSION, upon consideration of the matter, is of the opinion and finds that Chesapeake may be granted permission to petition the courts of this Commonwealth to initiate

condemnation proceedings to acquire the desired utility easement across the parcel of land owned by Suffolk to install its proposed water transmission line.

Chesapeake has requested the Commission's permission to commence condemnation proceedings against Suffolk pursuant to § 25-233 of the Code. In Application of the City of Virginia Beach, For a certificate pursuant to Va. Code § 25-233, Case No. PUE-1994-00048, Opinion, 1995 S.C.C. Ann. Rept. 313, 314 (March 6, 1995) ("Application of the City of Virginia Beach"), the Commission found that § 25-233 of the Code assigns it a task of limited scope. In that case, the Commission was to determine whether Virginia Beach should be permitted access to the courts of the Commonwealth to attempt to condemn property necessary to build a water pipeline. The Commission noted that this determination involves whether a public necessity or an essential public convenience requires the taking, and whether the property is essential to the purposes of the entity from which it will be taken. Finding that it had no jurisdiction to approve the pipeline project itself, the Commission stated:

To interpret § 25-233 to give us such jurisdiction would convert that limited statute into a gateway through which Commission jurisdiction might be extended to an infinite number of subjects, as long as a locality or utility sought condemnation of the property of another locality or utility to accomplish some minor part of the

objective. We do not interpret § 25-233 to intend such a broad grant of jurisdiction.

Here, as in Application of the City of Virginia Beach, the Commission must decide whether Chesapeake may be permitted access to the courts of the Commonwealth by finding whether a public necessity or essential public convenience so requires, and whether the property is essential to the purposes of Suffolk.

Based on the record before us, Chesapeake has established that it requires 0.0967 of an acre, more or less, of Suffolk's property for the proposed installation of a water pipeline to meet its water demands. We find, therefore, that the public necessity or essential public convenience has been established.

We also find that the property sought to be condemned is not essential to the purposes of Suffolk. Suffolk states that the Code "does not authorize Chesapeake to condemn property, in this case a water source, that it can't even identify."<sup>3</sup> The "property" in this proceeding, however, is not a water source. Rather, under § 25-233 of the Code, the "property" is 0.0967 of an acre of land. In our analysis pursuant to § 25-233 of the Code, we consider whether it is the property, not the use, that is essential to Suffolk. We note that, on June 19, 2002, Suffolk adopted an Ordinance authorizing the Suffolk City

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<sup>3</sup> Supplemental Brief at 8.

Manager to execute an easement agreement with Chesapeake for the 0.0967 of an acre of land. Thus, we find it is clear that the property is not essential to Suffolk's purpose.

We deny Suffolk's Motion to Dismiss. In the Motion to Dismiss, Suffolk asserts that the certification sought by Chesapeake from this Commission is no longer required. Suffolk contends that the Ordinance it adopted on June 19, 2002, grants a utility easement to Chesapeake over the desired parcel of land. Suffolk states that, as a result, Chesapeake is able to construct the transmission main and convey all the water it is presently entitled to and needs.

The easement offered by Suffolk, however, does not reflect the easement sought by Chesapeake as described in its amended application in this proceeding. Thus, Chesapeake still seeks permission from this Commission under § 25-233 of the Code to petition the courts to take property by condemnation. As explained above, we have made the findings required by § 25-233 of the Code in favor of Chesapeake.

Moreover, as also explained above, the Commission has limited authority in this matter. Suffolk claims that Chesapeake "wants to seize an advantage over the rest of the jurisdictions regarding access to future water supply."<sup>4</sup> Suffolk

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<sup>4</sup> Id. at 11.

then contends that the "law affords the Commission no role in assisting Chesapeake to carry out this agenda."<sup>5</sup> Our Order today, however, does not speak to these issues. The proceeding herein involves access to the courts of the Commonwealth. We need not make any findings, for example, as to allocations of water resources or access to water supply. Contrary to Suffolk's assertions, the Commission's action herein does not "grant Chesapeake an undefined water allocation," does not "rule that Chesapeake is entitled to free discretion and unlimited allocations of water from any source through its pipeline," and does not "adjudicate legal rights under [the 1997 Four-City] Settlement Agreement."<sup>6</sup>

We conclude that the findings required by § 25-233 of the Code are made in favor of Chesapeake. We will, therefore, grant Chesapeake permission to initiate the condemnation proceeding in the courts of the Commonwealth to acquire the desired utility easement across the parcel of land owned by Suffolk to install its proposed water transmission line.

Accordingly, IT IS ORDERED THAT:

(1) Suffolk's Motion to Dismiss is hereby denied.

(2) Chesapeake is hereby granted permission to initiate a condemnation proceeding in the courts of the Commonwealth to

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<sup>5</sup> Id.

<sup>6</sup> Id. at 6, 8, 10.

acquire the desired utility easement across the parcel of land owned by Suffolk to install its proposed water transmission line.

(3) This matter is hereby dismissed from the Commission's docket of active proceedings, and the papers filed herein shall be placed in the Commission's file for ended causes.